

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

KIRK JOHNSTON,

PLAINTIFF

V.

CHAD KROEGER, MICHAEL KROEGER,
RYAN PEAKE, DANIEL ADAIR, WARNER
MUSIC GROUP, ATLANTIC RECORDING
CORP., ROADRUNNER RECORDS, INC.,
WARNER/CHAPPELL MUSIC, INC., AND
LIVE NATION ENTERTAINMENT, INC.

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NO. 1:20-CV-00497-RP

**DEFENDANT LIVE NATION ENTERTAINMENT, INC.’S MOTION TO DISMISS
PLAINTIFF’S COMPLAINT PURSUANT TO FRCP 12(B)(6)**

Defendant, Live Nation Entertainment, Inc., (“Live Nation”) files this Motion to Dismiss for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Live Nation asks the Court to dismiss with prejudice Plaintiff Kirk Johnston’s (“Plaintiff’s”) original complaint for alleged copyright infringement of Plaintiff’s musical composition.

I. INTRODUCTION AND BACKGROUND

1. Live Nation is an event promoter, including concerts. Plaintiff has articulated no facts to justifying Live Nation’s status as a culpable party in this lawsuit. Moreover, there is no allegation that Live Nation copied any work to which Plaintiff claims an interest or in any way specifically violated the Copyright Act. In fact, the only oblique reference made about Live Nation in Plaintiff’s complaint at Paragraph 11 is that “on information and belief, Live Nation has promoted and continues to promote live concerts for WMG¹ and the Nickelback Defendants,

¹ Presumably, WMG stands for Warner Music Group, which the Plaintiff voluntarily dismissed on August 11, 2020 [Dkt. 11].

including performance of the infringing Rockstar song.” This unsupported assertion does not provide “sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

2. On a motion to dismiss a music copyright claim, the Court has a duty to compare the works at issue from the vantage point of an ordinary observer. If the works do not sound substantially similar to a layperson, no copyright infringement claim lies. Likewise, there can be no claim for copyright infringement where any conceivable lyrical similarities between two works arise from well-tread themes and tropes, which are not protected by copyright. Nor can short phrases and titles, which are not copyrightable, give rise to an infringement lawsuit. As a result, Live Nation, pursuant to Federal Rule of Civil Procedure 10(c) adopts and incorporates by reference herein, Defendants Chad Kroeger, Michael Kroeger, Ryan Peake, Daniel Adair, Roadrunner Records, Inc., and Warner Chappell Music, Inc.’s Motion to Dismiss Plaintiff’s Complaint Pursuant to FRCP 12(b)(6) [Dkt. 17, filed October 22, 2020] and pleads and asserts the same against Plaintiff herein.

II. CONCLUSION

For these reasons, Plaintiff failed to state a claim upon which relief may be granted against Live Nation. No amendment could cure the fatal flaws in Plaintiff’s claim. Therefore, Live Nation respectfully requests that the Court grant this motion, dismiss Plaintiff’s copyright infringement claim against Live Nation, in its entirety, with prejudice, and grant all such other and further relief, either at law or in equity, general or special, to which Live Nation is justly entitled.

Dated: October 22, 2020

Respectfully Submitted,

FOLEY & LARDNER LLP

By: /s/ Geoffrey H. Bracken

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**ATTORNEYS FOR DEFENDANT, LIVE
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CERTIFICATE OF SERVICE

I certify that on October 22, 2020 a true and correct copy of the foregoing document was served upon the following counsel of record in accordance with the Federal Rules of Civil Procedure.

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